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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE HEPPENSTALL COMPANY,
Petitioner,

v.

WILLIAM A. MURPHY, MARVIN PEASE, WILLIAM ROGERS, EDWARD BANACHOSKI, ALBERT BETTS, WILLIAM FAHERTY, ALBERT CHRISTMAN, ROMAN KRYSINSKI, CHARLES MANJEROVIC, WALTER REGAN, JOHN AUSTIN, JR., FRANK CONIGLIO, FRANK KUSH, LAWRENCE WIESEN, JOHN CHMILL AND SIDNEY ROBINSON,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	PAGE
Table of Authorities	1
Argument in Reply	1

TABLE OF AUTHORITIES

CASES	PAGE
In re Alan Wood Steel Co., 212 BNA Pension Reporter D-1 (E.D. Pa. 1978)	1
Alessi v. Raybestos-Manhattan, Inc., 68 L.Ed.2d 402 (1981)	2
Amato v. Bernard, 618 F.2d 559 (9th Cir, 1980)	7
Bittner v. Sadoff & Rudoy Industries, 490 F.Supp. 534 (E.D. Wis. 1980)	6
Cambist Films, Inc. v. Duggan, 475 F.2d 887 (3d Cir. 1973)	6
Challenger v. Local U. No. 1 of Intern. Bridge, 619 F.2d 645 (7th Cir. 1980)	7
Dependahl v. Falstaff Brewing Corp., 491 F.Supp. 1188 (E.D. Mo. 1980)	6
Huge v. Old Home Manor, 419 F.Supp. 1019 (W.D. Pa. 1976)	6
In the Matter of M & M Transportation Company, 288 BNA Bankruptcy Reporter D-4 (S.D.N.Y. 1980)	1
Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980)	1, 4, 5
Pension Benefit Guaranty Corp. v. Heppenstall Co., 633 F.2d 293 (3d Cir. 1980)	7
Stryjewski v. Local Union No. 830, 451 Pa. 550, 304 A.2d 463 (1973)	6

Statutes	Page
The Employee Retirement Income Security Act of September 2, 1974, Pub.L. 93-406 (88 Stat. 832) as amended (29 U.S.C. 1001 ff.)	
Section 3(31) (29 U.S.C. 1002(31))	3
Section 301(a) (29 U.S.C. 1081 (a))	3
Section 302 (29 U.S.C. 1082)	3
Section 502(a)(1)(B) (29 U.S.C. 1132(a)(1)(B))	5, 6
Section 510 (29 U.S.C. 1140)	6
Internal Revenue Code of August 16, 1954 (68A Stat. 5, 26 U.S.C. 1 ff.)	
Section 411(d)(3) (26 U.S.C. 411(d)(3))	5
Section 412 (26 U.S.C. 412)	3
Section 4971 (26 U.S.C. 4971)	3

Internal Revenue Publications and Rulings	
I.R.S. Pub. 778 (2-72)	3
Rev. Rul. 71-91, 1971-1 C.B. 116	3
Treas. Reg. 1.411(a)-4(a)	5

Secondary Authorities	
Exempt Compensation Arrangements under ERISA, 28 Cath. U.L. Rev. 445 (1979)	1
McGill, D., Employer Guarantee of Pension Benefits (1974)	4
McGill, D., Fundamentals of Private Pensions, 3rd edition (1975)	5
Prentice-Hall, Pension and Profit Sharing Forms, ¶ 51,104	4

REPLY BRIEF FOR PETITIONER

Argument in Reply

Respondents' brief in opposition, received August 7, 1981, places its principal reliance on *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), without even attempting to answer petitioner's argument (petition, pp. 17-19) explaining how the opinion in that case, dealing with a pre-ERISA plan, is inapplicable to the post-ERISA plan of the present case. Respondents also rely (brief, p. 2, fn. 1) on *In re Alan Wood Steel Co.*, 212 BNA Pension Reporter D-1 (E.D. Pa. 1978), and on *In the Matter of M & M Transportation Company*, 288 BNA Bankruptcy Reporter D-4 (S.D.N.Y. 1980), without attempting to answer petitioner's arguments as to them (petition, pp. 14-15).

The *Nachman* case is not authority to permit an employee to bring a direct action against his employer for benefits allegedly due him under a pension benefit plan covered by ERISA. ERISA provided that employees' rights under such a pension plan would be guaranteed by the Pension Benefit Guaranty Corporation (PBGC). PBGC does not guarantee pay-as-you-go plans (petition, p.12). It guarantees only I.R.S.-approved plans complying with the requirements of ERISA, including ERISA's funding requirements.[1]

Plaintiffs at bar are attempting to argue that the same clause of their collective bargaining agreement with petitioner gave them not only a funded plan covered by ERISA with payments guaranteed by PBGC, but also an unfunded plan not covered by ERISA with enforce-

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1. For discussion of unfunded plans, see Exempt Compensation Arrangements under ERISA, 28 Cath. U. L. Rev. 445 (1979).

ment rights directly against their employer under ERISA.[2] Their present claim is on the latter, which they are seeking to enforce in a common law action of indebitatus assumpsit. The courts below held that they could recover directly from their employer on this claim.

A funded plan guaranteed by PBGC cannot at the same time be a pay-as-you-go plan on which the employees can recover directly against their employer. The agreement in the case at bar clearly created a pension benefit plan governed by ERISA and guaranteed by PBGC. It cannot at the same time be an unfunded plan not covered by ERISA. The common law action of indebitatus assumpsit was one of the theories employed to enforce rights under state contract law applicable to pension plans prior to ERISA. Such rights have now been preempted by ERISA: *Alessi v. Raybestos-Manhattan, Inc.*, 68 L.Ed.2d 402 (1981). Therefore no common law rights remain to be enforced by employees against their employer. Their only rights are against the plan or its insurer, PBGC, under ERISA.

The Court of Appeals held petitioner directly liable to its employees, despite the Court's conclusion that a limitation of benefit recovery clause was extant (5a), because of the Court's belief that the employer could fund the pension plan to whatever extent it wished. If the employer could exercise complete discretion as to the funding *vel non* of the plan, and the limitation of recovery clause restricted the money the participants could receive to that in the pension plan's trust, then participants would have fully vested rights in scant benefits.

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2. Plaintiffs are forced into the inconsistent position of suing under ERISA on a plan not covered by ERISA, because without ERISA the federal district court had no jurisdiction, there being no diversity of citizenship between plaintiffs and their employer.

(5a) Because participants' rights under the plan and its trust were of little value, participants must be able to recover, under the collective bargaining agreement, directly from the employer. (5a) This was the reasoning of the Court of Appeals.

The essential flaw in the Court of Appeals' reasoning was their failure to recognize that funding requirements were imposed on the employer by sections 3(31), 301(a) and 302 of ERISA (29 U.S.C. §§ 1002(31), 1081(a), 1082)), regardless of the pension agreement's provisions on the matter or lack of them. The Heppenstall Company pension plan could not have secured and maintained I.R.S. approval unless it was funded.[3] The employer could exercise discretion to exceed the statutory minimum imposed by ERISA and the Internal Revenue Code (the minimum funding standard account) if it wished, but would be penalized if it did not at least satisfy the statutory minimum. I.R.C. § 4971, 26 U.S.C. § 4971.

The situation the Court of Appeals found unacceptable—the right to recover pension benefits from a trust of little value—was exactly what Congress intended to eliminate when it enacted ERISA. The minimum funding requirements imposed by ERISA and the Internal Revenue Code accomplished this result. There is therefore no need to hold the employer liable to participants for their benefits, because the participants already have, under ERISA, their right to be paid by the plan's insurer—the PBGC.

Respondents argue (brief, pp. 1, 5, 9) that the purpose of ERISA was to ensure that pensioners would receive their pensions, and that this purpose is best carried

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3. Internal Revenue Code § 412, 26 U.S.C. § 412; I.R.S. Pub. 778 (2-72) part 2(b) (53a); Rev. Rul. 71-91, 1971-1 C.B. 116 (52a).

out by imposing on their employers direct liability to make payments to the pensioners. Indeed, respondents say (brief, pp. 2, 6) that such liability was "the only buttress upholding [the pensioners'] expectations before the Act's passage." Respondents completely ignore the undisputed legislative history of what brought about the Act's passage: that employers previously disclaimed *all* liability for unfunded benefits, and that the Act made them responsible for part of them—30 percent (petition, p. 16). Respondents also ignore the statement of Mr. Justice Stevens in the *Nachman* case (petition, p. 18) that if the employer were directly liable to the employees for any funding deficiencies, the Act's provisions making the employer liable for only part of them (30%) would serve no useful purpose.

Respondents state (brief, p. 3) that "a sizeable number [of employers] retain direct liability" in their pension plans, and (fn. 5) that "In the steel industry such guarantees are found in plans covering hundreds of thousands of participants," citing Prentice-Hall, Pension and Profit Sharing Forms, ¶ 51,104. Paragraph 51,104 proves no such thing. It simply sets forth a form of clause identical to the clause in the Heppenstall collective bargaining agreement, section 1.3 (petition, appendix A, p. 6a).

Respondents argue (brief, p. 5, fn. 9) that "Professor McGill, a noted commentator on pension matters, endorsed the concept of direct liability shortly after ERISA's enactment. D. McGill, Employer Guarantee of Pension Benefits, 7-8 (1974)." Professor McGill endorsed no such thing. He said (p. 8), before the enactment of ERISA, only that "employers *should consider* the feasibility and desirability of making accrued pension benefits a claim against their corporate assets to the extent that the assets in the plan are insufficient to satisfy all such

claims." (emphasis supplied). In the preface to this work (pp. ix-x) he recognized the danger of imposing full liability on the employers, and in his concluding observations (p. 39) he flatly stated (p. 40) that the corporate liability imposed by ERISA "is limited to 30 percent of the firm's net worth."[4]

Respondent asserts (p. 6, fn. 12) that petitioners' argument requires the forfeiture of otherwise vested benefits. In this respondent is mistaken. Petitioners argue, not that vested benefits are forfeited, but that ERISA provides, upon termination of a plan, that pensioners' recovery shall be limited to the assets of the plan, which could be less than 100% of the vested benefits. Cf. Treas. Reg. 1.411(a)-4(a). Their vested rights are not forfeited. This is in accordance with *Nachman* (446 U.S. at p. 372).

Respondents argue (brief, p. 9, fn. 17) that the amendment which the Internal Revenue Code (§ 411(d)(3)) required to be made to the pension agreement (76a), was "only a vesting provision whose scope it measures by reference to funding." Respondents thus agree that benefits which were unfunded at the time of termination were not vested. Unvested rights being cut off by the termination, respondents have no claim for them against anyone.

Respondents argue (brief, p. 9, fn. 19) that section 502(a) of ERISA (29 U.S.C. § 1132(a)) has been construed by the lower courts "as providing a direct action

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4. See also Professor McGill's analysis of ERISA in Fundamentals of Private Pensions, 3rd edition (1975), where he discusses (p. 456) the employer's obligation, when the termination of a plan is imminent, to reflect its formerly contingent liability for unfunded benefits up to 30 percent of its net worth on its balance sheet. If the employer were also directly liable to its employees for additional sums, that liability would also have to be reflected on the balance sheet. Yet Professor McGill did not mention this.

against employers in a number of situations," citing three federal district court cases. None of them provided a direct action in the situation presently before the Court. In the first, *Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188 (E.D. Mo. 1980), plaintiffs sued their employer, not to recover benefits under the plan, but for declaratory and injunctive relief to retain their rights under an employee welfare benefit plan of which their employer sought to deprive them by unjustifiably terminating their employment for the sole purpose of cutting off vested benefits.[5]

The same is true of the second district court case cited by respondents, *Bittner v. Sadoff & Rudoy Industries*, 490 F.Supp. 534 (E.D. Wis. 1980), an employee's action against his employer for damages for retaliatory firing in violation of section 510 of ERISA (29 U.S.C. § 1140). The district court agreed with defendant employer's contention that "the statute only provides for equitable remedies," and held that pursuant to its equitable power "to put plaintiff back into the position he enjoyed before the discharge," it could also award damages (490 F.Supp. at p. 536). This was in accordance with classic equity practice: once a court of equity has assumed jurisdiction, it will grant complete relief, including a judgment for money damages: *Stryjewski v. Local Union No. 830*, 451 Pa. 550, 304 A.2d 463 (1973); *Cambist Films, Inc. v. Duggan*, 475 F.2d 887, 890 (3d Cir. 1973).

In the third district court case cited by respondents, *Huge v. Old Home Manor*, 419 F.Supp. 1019 (W.D. Pa.

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5. Their suit against their employer was not one by a participant "to recover benefits due to him under the terms of his plan" (ERISA, section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)), but "to clarify his rights to future benefits in the plan and to enjoin any act which violates any terms of ERISA or the plan": 491 F.Supp. at p. 1196.

1976), plaintiffs were not employees but the trustees of the United Mine Workers' Health and Retirement Trusts, suing to force an employer to pay agreed-upon contributions into the pension trust.

Respondents' final argument (brief, p. 10) is that there is no conflict between the decision of the courts below refusing to enforce the arbitration clause of the collective bargaining agreement and the decisions of other circuits which have enforced provisions for arbitrating pension disputes, citing *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980), and *Challenger v. Local U. No. 1 of Intern. Bridge*, 619 F.2d 645 (7th Cir. 1980). The exact opposite is true. In both those cases the employee's complaint was dismissed because of his failure to exhaust his administrative remedies before bringing suit. Those decisions support petitioner and squarely conflict with that of the courts below in the case at bar, where the employees' complaint was not dismissed despite their failure to exhaust their administrative remedies.

The position of Respondent throughout its brief clearly demonstrates the fundamental problem of confusion engendered by this case since its inception. In order to maintain Respondent's position, it would be necessary to find, as did the Court of Appeals, the existence of a "plan, fund or program" as a contract which provided for "retirement income to employees", but which is not covered by ERISA. In addition, it would be necessary to find this separate and independent "plan, fund or program" within the four corners of the same document which creates a "plan, fund or program" that is subject to ERISA and that was terminated by action of PBGC, an act of termination confirmed by the same Court of Appeals: *Pension Benefit Guaranty Corp. v. Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980). It would

also be necessary to find that the "plan, fund or program" as a contract which is not covered by ERISA nevertheless is covered by ERISA insofar as enforcement of employee rights is concerned. Respondent also asks the Court to accept that there can exist in the same document a "plan, fund or program" which does not have to be funded because it is not subject to ERISA, and at the same time funded because it is subject to ERISA; which has benefits covered by Title IV of ERISA but the same benefits are not covered by Title IV of ERISA; whose assets must be held in trust and whose assets need not be held in trust, and containing a limitation of benefit clause that is at the same time both effective and ineffective as to the same benefit, with all of these elements being conditioned for their existence upon this "plan, fund or program" contract's meeting the requirements of the Internal Revenue Code as a qualified plan. Such a maze of inconsistencies surely cannot have been intended by Congress as a statutory solution to achieve uniformity.

Respectfully submitted,

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